



5-1-1957

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Recommended Citation

George A. Patterson, *Real Property -- Covenants Running with the Land: Their Desirability and Utility*, 32 Notre Dame L. Rev. 502 (1957).

Available at: <http://scholarship.law.nd.edu/ndlr/vol32/iss3/8>

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Real Property

COVENANTS RUNNING WITH THE LAND:

THEIR DESIRABILITY AND UTILITY

Introduction

Uncertainty in the law of real covenants has long plagued courts in the United States. The problem generally has centered around the tests or criteria which determine whether or not a covenant is one that may "run with the land," i.e., a covenant that will bind subsequent purchasers and sellers although they are not a party to the original agreement. This uncertainty, mainly caused by the common law axiom that such covenants are encumbrances on the title to land and thus should be strictly construed in order not to impede the free alienability of land, has done much to retard the use of these covenants. This is true even in the face of the possibility, and often times without considering that possibility to any extent, that these covenants could be of some value to the landowners concerned. This is unfortunate; it seems that a positive attitude by the courts toward these covenants could perform a valuable service to those homeowners who have made and are relying on such covenants.

In order to promote a more adequate consideration of these covenants by courts and lawyers, the theory of this Note will be to emphasize that dimension of the problem which paradoxically enough is most often overlooked: the utility of running covenants. For this reason, at the conclusion, the article will resolve itself into a consideration of what would seem to be the basic question involved: are these covenants valuable enough to landowners and to society to outweigh any objection which might be made concerning their use. Possibly a uniform answer to this question, one on which a majority of the members of the legal profession could agree, would do more toward paving the way for a clarification of the law of running covenants than anything else.

Today as a result of the continual race to the suburbs throughout the country, extensive new residential areas have been developed. Many of the new homeowners in these areas, desirous of protecting their investment, have made agreements with their seller and/or with their neighbors regarding their property. These people want to know if their agreements will still protect them should one of their neighbors decide to sell to some one

else; or if they themselves should desire to sell, will the prospective purchaser also be protected by these agreements merely because he has purchased the land. The theory of the running covenant is as simple as that. Yet, in many cases, courts persist in keeping the real value of the covenant shrouded in considerations of whether or not it meets standards set hundreds of years ago. Consideration is not given to the possibility that these tests may be outmoded and do not meet the needs of modern society and the modern landowner.

The scope of this Note will include a brief discussion of the law of covenants running with a fee as it stands today. Then it will proceed to an objective evaluation of certain types of covenants. Naturally, every conceivable covenant which could run with the land will not be discussed. Rather, analysis will be limited to those covenants which are used most often by homeowners, and which lend themselves more readily to use in this period of new home construction.

Tests Applicable to Running Covenants

Almost all states require that a real covenant satisfy four tests before it will run with the land. These tests are: (1) the form of the instrument creating the covenant, (2) the intention of the parties, (3) whether or not the covenant "touches or concerns" the property concerned, (4) privity of estate.¹ Most courts will agree that these are the requirements which must be met before the covenant can be enforced, but conflict arises in the application of these four requisites.

When considering the form requirement, most courts demand that the covenant be in writing. Some states require a written instrument because they believe such covenants to be an interest in land.² Other courts do so for pure policy reasons, favoring certainty in realty titles by disallowing restrictions based solely "on oral testimony, which by nature is oft-times indefinite and inherently unstable."³ To complete the confusion, still other courts do not require that these covenants be in writing, holding that running covenants are not interests in land.⁴ Also to be

¹ *Neponsit Property Owners' Assn. v. Emigrant Industrial Sav. Bank*, 278 N.Y. 248, 15 N.E.2d 793 (1938); *McIntosh v. Vail*, 126 W. Va. 395, 28 S.E.2d 607 (1943); 2 *AMERICAN LAW OF PROPERTY* §§ 9.9, 9.11, 9.13, 9.22 (Casner ed. 1952); *CLARK, COVENANTS AND INTERESTS WHICH RUN WITH LAND* 94 (2d ed. 1947); 3 *TIFFANY, REAL PROPERTY* §§ 848, 851, 854 (3d ed. 1939).

² *Davis v. Robinson*, 189 N.C. 589, 127 S.E. 697 (1925).

³ *Warren v. Protano Inc.*, 155 N.Y.S.2d 686, 693 (Sup. Ct. 1956).

⁴ *McCloskey v. Kirk*, 243 Pa. 319, 90 Atl. 73 (1914). The American Law of Property agrees that these covenants are not interests in land. It states

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considered under the form requirement is the necessity of a seal. Since the necessity for the use of a seal in formal transactions has been largely abolished today by statute, the seal generally is not required on a running covenant.⁵ This is not a unanimous holding, for seals are still required on running covenants in those jurisdictions which have not abolished the use of the seal.⁶ Mention should be made, too, of those covenants which may be contained in a deed poll. The general rule is that a deed poll will satisfy the form requirement.⁷

For the most part, there is general agreement in the application of the intent requirement.⁸ It is well settled that the words "heirs and assigns" are not essential to show an intent that the covenant should run with the land; rather, courts will find that intent from the surrounding circumstances.⁹ There is some discrepancy, however, as to the application of the term "surrounding circumstances," since in some states the courts will look at all of the circumstances surrounding the signing of the covenant,¹⁰ while in other states only the instrument itself is considered to show that the requisite intention was present when the covenant was signed.¹¹

that they are contracts only. 2 AMERICAN LAW OF PROPERTY § 9.8 (Casner ed. 1952). Sims points out that England and fourteen states seem to, also, agree that the covenants are not interests in land, while nine states still hold that they are. He concludes by saying that actually it makes little difference whether or not they are considered interests in land, since "probably more than ninety per cent of covenants intended to be attached to land are in writing." Sims, *The Law of Real Covenants: Exceptions to the Restatement of the Subject by the American Law Institute*, 30 CORNELL L.Q. 1, 28 (1944).

⁵ *Atlanta, K. & N. Ry. v. McKinney*, 124 Ga. 929, 54 S.E. 701 (1906); 2 AMERICAN LAW OF PROPERTY § 9.9 (Casner ed. 1952).

⁶ *Safe Deposit & Trust Co. of Baltimore v. Baltimore-Gillet Co.*, 176 Md. 594, 6 A.2d 226 (1939).

⁷ *Sanitary Dist. v. Chicago Title & Trust Co.*, 278 Ill. 529, 116 N.E. 161 (1917); *Sexauer v. Wilson*, 136 Iowa 357, 113 N.W. 941 (1907); RESTATEMENT, PROPERTY § 532 (1944). The Restatement also requires that the covenant be in writing and under seal where seals are required, on the rationale that these covenants are interests in land. It agrees that where the effectiveness of the seal has been abolished by statute, a seal is not necessary.

⁸ 2 AMERICAN LAW OF PROPERTY § 9.10 (Casner ed. 1952). Mr. Tiffany also points out what seems to be the universal holding of the courts that even though a covenant may satisfy all of the other tests necessary, the parties may prevent its running with the land if they show an intention that it not run. *Id.* § 854.

⁹ *Bagby v. Stewart's Ex'r*, 265 S.W.2d 75 (Ky. App. 1954); *Maher v. Cleveland Union Stockyards Co.*, 55 Ohio App. 412, 9 N.E.2d 955 (1936); *Aull v. Kraft*, 286 S.W.2d 460 (Tex. Civ. App. 1956).

¹⁰ *Maher v. Cleveland Union Stockyards Co.*, *supra* note 9.

¹¹ *Aull v. Kraft*, 286 S.W.2d 460 (Tex. Civ. App. 1956).

Probably the most difficult of the four tests to define is touch and concern: "... It has been found impossible to state any absolute tests to determine what covenants touch and concern the land and what do not."¹² Even faced with this difficulty, and in many cases recognizing it, the courts almost unanimously hold that such a test must be met.¹³ The test most often used to discover whether or not a certain covenant runs with the land is that set forth by the late Dean Bigelow:

The determining characteristic of the covenants now being considered is that they operate either to make more valuable some of the rights, privileges, or powers possessed by the covenantee or relieve him in whole or in part of some of his duties.¹⁴

In following this test, courts have usually required that the covenant affect the nature, use, enjoyment, and value of the land,¹⁵ or that it be "so related to the land as to enhance its value and confer a benefit upon it."¹⁶

Though courts do agree for the most part as to the requirements which satisfy the touch and concern factor, there has been wide disagreement as to the type of covenants which meet those requirements. Professor Sims vividly pointed out this fact,¹⁷ and he gave the following as an example. An English court considered a covenant to ship coal from a particular mine over an auxiliary railroad not to touch and concern the mine from which the coal was taken,¹⁸ while a Pennsylvania court found

¹² CLARK, COVENANTS AND INTERESTS RUNNING WITH LAND 96 (2d ed. 1947).

¹³ Atlantic Coast Line R. Co. v. Georgia, Ashburn, Sylvester & Camilla Ry. Co., 91 Ga. App. 698, 87 S.E.2d 92 (1955); Tucker v. Carter Oil Co., 315 Ill. App. 264, 43 N.E.2d 99 (1942); Cook v. Tide Water Associated Oil Co., 281 S.W.2d 415 (Mo. App. 1955); Craven County v. First-Citizens Bank & Trust Co., 237 N.C. 502, 75 S.E.2d 620 (1953); Caplan v. Pittsburgh, 375 Pa. 268, 100 A.2d 380 (1953); 2 AMERICAN LAW OF PROPERTY § 9.13 (Casner ed. 1952).

¹⁴ Bigelow, *The Content of Covenants in Leases*, 12 MICH. L. REV. 639, 645 (1914). It should be noted that although Bigelow was writing about running covenants in leases, nevertheless, the test he set forth in the article is applicable to running covenants in other types of estates. The original statement of the requirement that a running covenant must touch and concern land was put forth in a case which involved a running covenant in a lease. *Spencer's Case*, 5 Co. Rep. 16a, 77 Eng. Rep. 72 (K.B. 1583); CLARK, COVENANTS AND INTERESTS RUNNING WITH LAND 96 (2d ed. 1947).

¹⁵ *Epting v. Lexington Water Power Co.*, 177 S.C. 308, 181 S.E. 66 (1935).

¹⁶ *Rodruck v. Sand Point Maintenance Comm'n*, 295 P.2d 714, 720 (Wash. 1956). See also *Atlanta, K. & N. Ry. v. McKinney*, 124 Ga. 929, 53 S.E. 701 (1906).

¹⁷ See Sims, *The Law of Real Covenants: Exceptions to the Restatement of the Subject by the American Law Institute*, 30 CORNELL L.Q. 1, 34 (1944).

¹⁸ *Keppell v. Bailey*, 2 Myl. & K. 517, 39 Eng. Rep. 1042 (1834).

that a similar covenant did touch and concern the mine involved.¹⁹ Covenants not to compete have been treated similarly by the different jurisdictions.²⁰ Also, one state, New York, has been a lone advocate of the proposition that only negative or restrictive covenants touch or concern the land; therefore, in New York, only negative covenants, as a rule, will be allowed to run with the land.²¹ However, all other jurisdictions seem to agree that under certain circumstances, affirmative covenants as well as negative covenants will run with the land.²² Even though the law as to which covenants do touch and concern the land is definitely not settled at the present, it does not seem that this requirement can be eliminated.²³ The Restatement of Property advocates a strict interpretation of the touch and concern requirement. It requires that a promise be for the benefit of either the promisor or the promisee in the *physical* use and enjoyment of the land, and that the burden on the land of the promisor bear a reasonable relation to the benefit received by the person benefited, in order that a covenant fulfill the touch and concern requirement.²⁴

The privity of estate requirement is the concept which has caused the real furor in the law of real covenants. Granting discrepancies in interpretation of the form and the touch and concern requirements, neither of these has provoked as much interest in the law of running covenants as has the requirement of privity of estate. As was the problem with the other tests, it is agreed that there must be such a requirement;²⁵ once again the difference is in the interpretation of the term. Conflict of opinion on the subject arose between Judge Charles E. Clark of the United States Courts of Appeals for the Second Circuit and Professor Oliver S. Rundell, the reporter for the section of the

¹⁹ *Bald Eagle Val. R.R. v. Nittany Val. R.R.*, 171 Pa. 284, 33 Atl. 239 (1895).

²⁰ *Sjblom v. Mark*, 103 Minn. 193, 114 N.W. 746 (1908). *Contra*, *National Union Bank at Dover v. Segur*, 39 N.J.L. 173 (1877).

²¹ *Guaranty Trust Co. v. New York & Queens County Ry.*, 253 N.Y. 190, 170 N.E. 887 (1930), *appeal dismissed*, 282 U.S. 803 (1930); TIFFANY, *REAL PROPERTY* § 854 (3d ed. 1939).

²² *Murphy v. Kerr*, 5 F.2d 908 (8th Cir. 1925); *Norby v. Section Line Drainage Dist.*, 159 Or. 80, 76 P.2d 966 (1938). See also *Annot.*, 102 A.L.R. 781 (1936).

²³ See Sims, *The Law of Real Covenants: Exceptions to the Restatement of the Subject by the American Law Institute*, 30 CORNELL L.Q. 1, 34 (1944).

²⁴ RESTATEMENT, PROPERTY § 537 (1944).

²⁵ *Wood Fabricators, Inc. v. Hayes*, 250 Ala. 475, 35 So. 2d 106 (1948); *Hazlet v. Sinclair*, 76 Ind. 488 (1881); *Cook v. Tide Water Associated Oil Co.*, 281 S.W.2d 415 (Mo. App. 1955).

Restatement of Property concerning servitudes, in a series of law review discussions.²⁶ At this same time, Mr. Sims also was writing on the subject of running covenants.²⁷ The gist of the articles by Clark and Sims, in regard to the privity of estate concept, was that the Restatement of Property was inaccurate in its privity of estate requirements. The Restatement sets out two alternative means of fulfilling the requirement: (1) by an adjustment of mutual relationships arising out of an easement, or (2) by there being a grant of land with which the covenant is to run at the time of the making of the covenant.²⁸ Sims stated in his article that seven states seemed not to require a grant in fulfillment of the privity of estate concept, citing one principal case in each of the enumerated states.²⁹ Of the cases cited by Sims, two involved party wall agreements,³⁰ another seemed to involve a covenant running with a leasehold interest and not a fee,³¹ and another involved a mortgage in which the grantee was not held liable for the mortgage payments since he took the property subject to the mortgage but did not expressly agree to make the payments.³² Moreover, a Michigan case cited by him involved a covenant written into a land contract, though the statement that a grant was necessary was not made in the case.³³ The privity requirement of California, listed as one of the seven states, is governed by statute.³⁴

After Sims' article was published, Clark wrote another article in which he praised the discussion by Sims, referring to it as being "in the grand tradition of legal scholarship."³⁵ Clark agreed

²⁶ Judge Clark criticized §§ 534 and 537 of the RESTATEMENT in Clark, *The American Law Institute's Law of Real Covenants*, 52 YALE L.J. 699 (1943). Professor Rundell answered him, Rundell, *Judge Clark on the American Law Institute's Law of Real Covenants: A Comment*, 53 YALE L.J. 312 (1944). Judge Clark then responded to Professor Rundell's comment, Clark, *A Note on Professor Rundell's Comment*, 53 YALE L.J. 327 (1944).

²⁷ Sims, *The Law of Real Covenants: Exceptions to the Restatement of the Subject by the American Law Institute*, 30 CORNELL L.Q. 1 (1944).

²⁸ RESTATEMENT, PROPERTY § 534 (1944).

²⁹ Sims, *supra* note 27 at 31.

³⁰ Southworth v. Perring, 71 Kan. 755, 82 Pac. 785 (1905); Loyal Mystic Legion v. Jones, 73 Neb. 342, 102 N.W. 621 (1905).

³¹ Herigstad v. Hardrock Oil Co., 101 Mont. 22, 52 P.2d 171 (1935).

³² Pelser v. Gingold, 214 Minn. 281, 8 N.W.2d 36 (1943).

³³ Mueller v. Banker's Trust Co., 262 Mich. 53, 247 N.W. 103 (1932).

³⁴ The effect of the California statutes seems to be that a benefit in a grant may run; a covenant burdening land may not run if it is in a grant, but it may run if it is made between adjoining landowners. CAL. CIV. CODE ANN. §§ 1462, 1468 (West 1954).

³⁵ Clark, *More About the "Law" of Real Covenants and Its Restatement*, 30 CORNELL L.Q. 378 (1945).

with Sims on the states listed by the latter as holding that no grant was needed between covenantor and covenantee to fulfill the privity of estate requirement, but said that he would add more states to the listing. Clark then listed twelve other states, some of which Sims had previously said required the grant.³⁶ Of the twelve, four states had cases expressly stating that a grant of land was needed between the convenanting parties.³⁷ In another, no grant was required, but the case involved a running benefit.³⁸

Four of the states he named apparently were in agreement with him;³⁹ it seems that they are the only states among the nineteen referred to by Clark which did support his position, and one of the four was controlled by statute.⁴⁰ A late Missouri case has also followed the views of Clark and Sims, requiring only a grant between the covenantor and his successor to constitute privity of estate.⁴¹ Thus, a majority of the states now require a grant of an interest in land between the convenanting parties to meet the requirement of privity of estate. The better rule, however, would seem to be the one advocated by Clark and Sims, even though at present the states which follow it are in a small minority.

Extra-Legal Considerations

An attempt will now be made to determine what value these covenants can be to society and to the landowners concerned. As has been mentioned earlier, not all the conceivable covenants will be considered. By necessity, a limited few have been

³⁶ Clark listed Alabama, Arkansas, Connecticut, Georgia, Illinois, Indiana, Maryland, New Mexico, North Carolina, South Dakota, Texas, Washington, *id.* at 384, n. 23. In the same footnote, he also mentions Colorado, Iowa, Kentucky, New Hampshire, Ohio, Oklahoma, Oregon and Wisconsin as states in which he found "nothing really inconsistent to prevent the adoption of such a rule. . . ." *Ibid.*

³⁷ *Blaum v. May*, 245 Ala. 156, 16 So. 2d 329 (1944); *Hazlett v. Sinclair*, 76 Ind. 488 (1881); *Barringer v. Virginia Trust Co.*, 132 N.C. 409, 43 S.E. 910 (1903); *Panhandle & S.F. Ry. v. Wiggins*, 161 S.W.2d 501 (Tex. Civ. App. 1942).

³⁸ *Shaber v. St. Paul Water Co.*, 30 Minn. 179, 14 N.W. 874 (1883).

³⁹ *St. Louis, I.M. & S. Ry. v. Sanders*, 91 Ark. 153, 121 S.W. 337 (1909); *Reidsville & S.E.R. Co. v. Baxter*, 13 Ga. App. 357, 79 S.E. 187 (1913); *Bolles v. Pecos Irr. Co.*, 23 N.M. 32, 167 Pac. 280 (1917); *Adamson v. Black Rock Power & Irr. Co.*, 297 Fed. 905 (9th Cir. 1924).

⁴⁰ GA. CODE ANN. § 29-301 (1952). "The purchaser of lands obtains with the title however conveyed . . . , all the rights which any former owner of the land, under whom he claims, may have had. . . ."

⁴¹ *Cook v. Tide Water Associated Oil Co.*, 281 S.W.2d 415 (Mo. App. 1955).

chosen: (1) covenants that property is to be used only for residential purposes; (2) covenants that a property owner annually will pay a certain amount of money into a fund for the upkeep and improvement of sidewalks, streets, etc., in the immediate area of the property concerned; (3) covenants that liquor will not be manufactured or sold on the premises; (4) party-wall covenants; (5) covenants to refund to property owners; and (6) minimum line setback covenants.

But before a detailed discussion of the individual covenants is begun, it might be beneficial to attempt to discern the role that policy considerations have played thus far in the law of covenants running with a fee, and what role these considerations should play in the future. A statement by Mr. Justice Holmes inferentially supports the proposition that value is to be derived from a study of the ends and desirability of certain specific laws:

I look forward to a time when the part played by history in the explanation of dogma shall be very small, and instead of ingenious research we shall spend our energy on a study of the ends sought to be attained and the reasons for desiring them.⁴²

As has been referred to earlier in this Note, the Restatement of Property places stringent limitations on the running of the burden in a real covenant. Granted the historical factor that such a limitation could be found in many of the cases decided before the Restatement was completed, still, Professor Rundell admits that there were strong policy considerations influencing the stated requirements. He and his advisors particularly wanted to limit the number of running covenants, believing that the underlying theory — that one man should be held to the promise made by another — makes them somewhat undesirable. They also felt strongly about consequent adverse effects on the alienability of land. Rundell expressly stated these objections in his reply to Clark's first criticisms of the Restatement:

Such a rule is certainly anomalous. It also has within it the certainty of increasing the hazards incident to the acquisition of title to land and thus the possibility of interfering with the freedom with which land is alienated. . . .⁴³

I say that any rule of law which imposes a promisor's liability on one who never made a promise is a highly anomalous one. . . .⁴⁴

⁴² Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 474 (1897).

⁴³ Rundell, *Judge Clark on the American Law Institute's Law of Real Covenants: A Comment*, 53 YALE L. J. 312, 315 (1944).

⁴⁴ *Id.* at 325.

That the rule stated in section 82 has its origins in considerations of policy, I admit. That policy is that the hazard of personal liability through succession to title to land on a promise made by someone else ought to be, and has been, strictly limited.⁴⁵

Rundell's two objections constitute general policy reasons which seem to substantiate the strict position taken by the Restatement in respect to running covenants. Are there counter-vailing policy factors at the same general level? Certainly there is no public policy which labels the individual covenants undesirable per se; the main objection, then, seems to be that the covenants are going to be enforced against persons other than those who made them. It must also be considered, however, that private ownership of land has never sanctioned complete unrestricted use. Landowners always have had to consider the effects on their neighbors of their activities on their own land.⁴⁶ Recognition of the fact that courts do not now recognize an "untrammelled" use of land by landowners, coupled with cognizance of the fact that these covenants are entered into with the mutual assent of the contracting parties, consideration being given for the promise and the parties expecting that the covenant will continue to remain in force after one of them conveys his property to another, will weaken the impact of the objection just

⁴⁵ *Id.* at 317, n. 10. Section 82 referred to in the quotation is section 82 of the Proposed Final Draft of the Property Restatement on Servitudes. Section 534 of the Restatement of Property is its substantial counterpart.

Rundell also admitted that policy reasons influenced the RESTATEMENT's rule on the running of the benefit in real covenants. He was strongly influenced by language used by Judge Beasley in *National Union Bank v. Segur*, 39 N.J.L. 173, 184-85 (1877), in which case Judge Beasley said:

"But when we turn our attention to the consideration of those covenants, which, instead of being burthensome to the land, are beneficial to it, we perceive at once that such objection does not apply. Such covenants do not hinder, but rather facilitate, the transmission of land from hand to hand, and, therefore, with respect to their transmissibility, the question of public convenience has no place. This being the case, it is not easy to see why any contract, which is of a nature to attach to the land, and which has a beneficial tendency, should not be considered assignable, by act of law, as against the covenantor, with the title."

In commenting on this case, Rundell said, "The reasoning of Judge Beasley seemed convincing to me when I first read it many years ago. It has remained convincing on each of the many times I have read it since. It is phrased in language I can understand." Rundell, *Judge Clark on the American Law Institute's Law of Real Covenants: A Comment*, *supra*, at 316.

⁴⁶ SHARTEL, OUR LEGAL SYSTEM AND HOW IT OPERATES 457 (1951).

noted, if properly considered by the courts.⁴⁷

With this background realization that private ownership of land does not and should not give the owner complete freedom to use the land any way he pleases, and considering the twentieth century trend to promote the general good,⁴⁸ analysis will be made of the individual covenants.

Property to be Used Only For Residential Purposes

In recent years, probably the most used of all of the covenants which run with the land is the covenant which restricts use of the property involved to residential purposes. The courts seemingly have recognized the value of these covenants and have been liberal in their consideration of them. Usually the courts will allow these covenants to run with the sale of a fee,⁴⁹ most

⁴⁷ Professor Stone described the theory behind these principles thusly:

"At least three major claims really merge into the claim to have contracts enforced.

(1) The claim that the promisor should keep his promise as such expressed in the natural law principle that *pacta sunt servanda*, sometimes called the honour principle. In a slightly modified form, taking the premise as understood by the recipient, this yields the cognate claim to fulfillment of reasonable expectations.

(2) The claim that where a *quid pro quo* is given, the receiver is bound for his part to reciprocate in the terms on which the *quid* was given, usually termed the bargain principle.

(3) The claim that where one person has to his detriment altered his position on another's undertaking that other shall make good the undertaking or compensate him for the detriment, usually termed the injurious reliance principle." STONE, *THE PROVINCE AND FUNCTION OF LAW* 537 (1950).

Whether or not the covenant running with the land is considered as a contract, it still must be agreed that such a covenant arises in the first instance only where the elements necessary for a contract are present. Therefore, it would seem that Professor Stone's discussion is apropos.

⁴⁸ See Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1, 35 (1943); SHARTEL, *op. cit. supra* note 49 at 453. See also CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 66-67 (1921) in which it is perspicaciously stated:

"The final cause of law is the welfare of society . . . Logic and history and custom have their place. We will shape the law to conform to them when we may; but only within bounds . . . I do not mean, of course, that judges are commissioned to set aside existing rules at pleasure in favor of any other set of rules which they may hold to be expedient or wise. I mean that when they are called upon to say how far existing rules are to be extended or restricted, they must let the welfare of society fix the path, its direction and its distance."

⁴⁹ *Elliot v. Keely*, 121 Ind. App. 529, 98 N.E.2d 374 (1951); *McLaughlin v. Neiger*, 286 S.W.2d 380 (Mo. 1956); *Cummins v. Colgate Properties Corp.*, 2 Misc. 2d 301, 153 N.Y.S.2d 321 (Sup. Ct.), *aff'd mem.*, 2 App. Div. 2d 749, 153 N.Y.S.2d 608 2d Dep't 1956). *But cf. Shuford v. Asheville Oil Co.*, 243 N.C. 636, 91 S.E.2d 903 (1956).

of the time only concerning themselves with the problem of whether or not the necessary intent that the covenant is to run is shown by the evidence. Usually this intent will be found more readily when the covenant is part of a general plan of residential building rather than when a single lot is involved.⁵⁰

The value of these covenants can readily be recognized: through their enforcement, home owners will be encouraged to improve their homes or build more expensive homes in the first instance since there will be no danger of business establishments moving in nearby and bringing about property depreciation. The importance of such protection has been aptly stated as follows:

To induce the expenditure of large sums of money in erecting residences in cities, there must be some legal machinery available for the purpose of protecting the investment from depreciation through the infiltration of businesses and undersirable structures into the subdivision. . . .⁵¹

Covenants That the Property Owner Annually Will Pay a Certain Amount of Money Into an Upkeep Fund

The leading case on this type of covenant, whereby a property owner agrees to annually pay a specified amount of money into a common fund, is that of *Neponsit Property Owners' Assn. v. Emigrant Industrial Sav. Bank*,⁵² involving an annual land charge payable to the property owners' association for the maintenance of the roads, paths, parks, beaches, sewers, etc., of the neighborhood. Even in the face of its own state restriction that only negative covenants touch and concern land,⁵³ and despite specific recognition that the covenant involved was an affirmative covenant to pay money, the New York court allowed the covenant to run, reasoning that the covenant in substance was a restrictive covenant and in substance did touch and concern the land, even though outwardly it did not appear to do so.⁵⁴ It seems rather evident that one of the most important factors in the decision, and probably the main reason for the court's deciding the case in the way it did, was its recognition of the utility of the covenant involved. In the opinion the court said: "For full enjoyment in common by the defendant and other

⁵⁰ *Aull v. Kraft*, 286 S.W.2d 460 (Tex. Civ. App. 1956); *Clark v. Guy Drews Post of American Legion No. 88*, 247 Wis. 48, 18 N.W.2d 322 (1945).

⁵¹ *Reno, The Enforcement of Equitable Servitudes in Land*, 28 VA. L. REV. 951, 970 (1942).

⁵² 278 N.Y. 248, 15 N.E.2d 793 (1938).

⁵³ See note 21 *supra*.

⁵⁴ 15 N.E.2d at 798.

property owners of these easements or rights, *the roads and public places must be maintained.*"⁵⁵ (Emphasis added.) Both the case and the quoted statement by the court illustrate the need for community effort in upkeep of roads and parks, beaches and playgrounds. These are concerns which, if not handled by the city, are peculiarly the joint interest of all of the surrounding landowners.⁵⁶ One can readily imagine the result of a plan whereby each landowner had the duty of providing and maintaining the streets in front of his property.⁵⁷

*Covenants That Liquor Will Not be Manufactured or Sold
on the Premises*

These covenants have prompted a sizable amount of litigation in the courts and the courts have usually allowed them to run.⁵⁸ This seems to be a wise policy. Not only do these covenants, except in certain limited instances, do very little to adversely affect the marketability of the land involved, but they prevent an extremely rapid depreciation of the value of property in the neighborhood. Very few businesses tend to cause depreciation of residential property value as fast as one that concerns alcoholic beverages. Moreover, the sale of these beverages will not be badly hurt by a strict policy of enforcement of these covenants by the courts. Persons who frequent taverns do not expect to find them in residential sections of the community; therefore, forcing them indirectly to stay in the non-residential areas should not harm their business. They will have the benefit of regulations concerning businesses in general, and they will be more free to conduct their inherently boisterous business without concern about disturbing neighboring homeowners.

How strongly one landowner felt about such an establishment can best be described by considering the covenant which he drew up. In it he equated the noxious character of the following businesses with establishments selling or manufacturing liquor: ". . . slaughterhouse, smithshop, forge, furnace, steam engine, brass foundry . . . any manufactory of gun-powder, glue, varnish, . . . ink or turpentine, or for the tanning, dressing or preparing of hides, skins, or leather . . . or for carrying on any other

⁵⁵ *Id.* at 797.

⁵⁶ See SHARTEL, *op. cit. supra* note 46 at 463.

⁵⁷ See *Rodruck v. Sand Point Maintenance Comm'n*, 295 P.2d 714 (Wash. 1956). For a similar case with a different result, see *Nassau County v. Kensington Ass'n*, 21 N.Y.S.2d 208 (Sup. Ct. 1940).

⁵⁸ *Condos v. Home Development Co.*, 77 Ariz. 129, 267 P.2d 1069 (1954); *Baker v. Seneca*, 329 Mass. 736, 110 N.E.2d 325 (1953).

noxious dangerous or offensive trade or business. . . ."⁵⁹ The utility and desirability of these covenants definitely seems to warrant their stringent enforcement.

Party-Wall Covenants

The running of the benefit or the burden of party-wall contracts has seemingly been a distressing problem to courts in general.⁶⁰ When considered objectively, these covenants do not seem as though they should be so difficult a problem. A typical party-wall agreement runs thusly. A and B are adjoining landowners. A desires to build a garage on his land and he wants to place one of its walls on the dividing line between his property and B's property. A asks B's permission to place half of the wall on B's side of the dividing line. B agrees and the agreement is put in writing and recorded so that subsequent owners of either of the lots will not think the wall to be a trespass. At the time the agreement is made, A tells B that he may use the wall as a wall for a building of his own, provided that he pay one-half the cost of the wall if he uses it. After building the wall, but before B attempts to use the wall, A sells his premises to D, and B sells his land to C. If C then decides to build a garage using the wall for one of the sides, why shouldn't a court enforce the burden of the A-B covenant against him? It seems as though both benefit and burden should run, because D paid for the wall when he bought the land from A. A certainly included the cost of building the wall and garage in his selling price. Similarly, the burden should also run, for when C buys from B, he will not be charged by B for any wall payment, since B has made no such payments. When C uses the wall as part of his garage, he is benefited by the wall and he should be made to pay his share of the cost of the wall. The encumbrance which such a covenant could be to the marketability of B's title is practically nil, especially when it is remembered that C will never have to pay the adjoining landowner anything if the wall is not used. If C does use the wall, then it seems justice would require that he pay his share of the cost of building it.

⁵⁹ *Kew Gardens Corp. v. Ciro's Plaza, Inc.*, 261 App. Div. 576, 26 N.Y.S.2d 553, 554 (2d Dep't 1941).

⁶⁰ *Beloit Bldg. Co. v. Quinn*, 145 Kan. 507, 66 P.2d 549 (1937); 3 *TIFFANY, REAL PROP.* § 855 (3d ed. 1939); Aigler, *The Running With the Land of Agreements to Pay for a Portion of the Cost of Party-Walls*, 10 *MICH. L. REV.* 187 (1912); Annot. 41 *A.L.R.* 1366 (1926).

Covenant to Refund Property Owners

This is a covenant some landowners attempt to use with the advent of new housing developments. Illustrative of the situation is the case of *Safe Deposit and Trust Co. v. Baltimore-Gillet Co.*,⁶¹ where a person purchased a tract of land and gave the appellants a purchase-money mortgage. Then he made a contract with the city for the extension of water mains under the streets which would be opened on the tract. He paid the city \$8,370 and made a stipulation for the allowance of credits or refunds as dwelling houses should be built and connecting charges paid. He assigned his refund rights to the appellees. The appellants foreclosed the mortgage and purchased at the sale, at which time there were some accumulated refund credits. Appellants tried to collect these refunds, saying that they ran with the land, but the Maryland court refused to rule that they did so.

In considering this decision, one might ask whether this covenant could be considered analogous to the previous party wall covenant and thus be allowed to run with the land. The court probably was acting in the best interests of landowners as a whole in saying "no," for, this covenant is capable of creating more mischief than the party-wall covenant. If this covenant ran with the land and the original covenantor desired to sell before the credits accumulated, he would certainly want to receive as much from his investment as he put into it. Therefore, he would have to collect for the land and house plus the amount of money which he paid the city. In many instances this would do much more than merely hinder the marketability of that land — it would practically make it unsalable. To include the amount of the deposit in the purchase price would drive practically all purchasers away. Most of them would not be willing to pay a price greatly in excess of the value of the real property, even knowing that the amount in excess of the value probably would be returned to them, because the return of the deposit is based on a contingency which may or may not come about. The Maryland court, in not allowing this agreement to run, seemingly has balanced the interests involved and come out with a workable result.

Minimum Line Setback Covenants

Minimum line setback covenants are found in many deeds today. The typical setback covenant contains statements to the effect that no buildings, fences, walls, etc., shall be placed within

⁶¹ 176 Md. 594, 6 A.2d 226 (1939).

a specified number of feet from the adjoining street. These covenants nearly always are upheld.⁶² In allowing such covenants to run, the courts rightly protect homeowners by keeping their neighbors from building extremely close to the street and cutting off the view, light, and air which are necessary incidents of the real comfort of a home and which the buyer no doubt considers when he purchases the home. These setback lines also protect the aesthetic value of the owner's home and neighborhood, providing a uniform line of homes fronting on the street. These positive factors, along with the negative one that such lines have become well accepted by buyers and therefore do very little if anything to detract from the marketability of land titles, prompt a conclusion that the courts have been wise in allowing such covenants to run. The decision in a recent case which reached that result shows that the courts are well aware of the value which landowners derive from minimum line setback covenants:

. . . [I]t is competent for our people to protect their homes and their access to light, air and view by covenants of restriction. The objectives are clear. The participants wish to foster and be part of a home area in which haphazard building, the crowding of lots and lot lines, is prohibited. No one is required to live in such an area. Those more gregarious, those desiring more intimate contact, have no difficulty in finding suitable headquarters elsewhere.⁶³

Methods of Releasing Restrictions Placed on Land by Running Covenants

One of the fears which writers voice in regard to running covenants is that they will be held enforceable by the courts even after becoming obsolete. Concern is shown lest covenants prevent buyers from purchasing property because of some requirement outmoded by changed conditions. The covenants conceivably could have this effect in a few instances; for the most part, however, sufficient legal means exist for property owners to rid themselves of inequitable restrictions in order that property not be encumbered by completely outmoded burdens. The basic rule of the release cases is that a covenant will not be enforced if there has been a substantial change in the neighborhood which would make enforcement of the covenants inequitable. "It is well established that restrictive covenants against business enterprises will not be enforced when there has been a fundamental change in the character of the property in the restricted area due to

⁶² *Oosterhouse v. Brummel*, 343 Mich. 283, 72 N.W.2d 6 (1956).

⁶³ *Id.* at 8.

municipal expansion, spread of industry and other like causes."⁶⁴ The mere fact that the removal of restrictive covenants would enhance the value of the land involved, however, is not enough to justify their removal.⁶⁵ A covenant will not be enforced where the grantor acquiesces in changes made,⁶⁶ nor will one be upheld where there has been a change in the subdivision brought about by the grantor.⁶⁷ Zoning ordinances do not eliminate or supersede these covenants, but an ordinance can be used to show evidence of changed conditions.⁶⁸ An important aspect of release considerations is the fact that a landowner whose land is subject to a running covenant need not violate that covenant in order to test it. In most instances an action for a declaratory judgment is allowed.⁶⁹

Thus, the fear that running covenants will place highly inequitable burdens on a landowner is largely unfounded. The legal process has provided remedies for the unduly burdened landowner; he will be released where such release is shown necessary by standards of fairness to both the restricted landowner and his neighbors.

Conclusion

Policy considerations should enter into the determination of the question of whether or not a covenant is going to be allowed to run with the sale of a fee. When these considerations are recognized, statements to the effect that all covenants should be strictly construed in order to promote the alienability of land contain an inherent contradiction, for some running covenants not only do not hinder the marketability of the land, but rather increase the value and desirability of the land involved. Moreover, the fear of these covenants placing inequitable burdens on land is ill-founded. It seems, then, that a more liberal attitude by the courts toward running covenants is warranted.

Whether or not the courts should continue to use the four tests is a more difficult question. Probably the Restatement's privity of estate provision should not be followed. If the privity of estate requirement is retained at all, it should be

⁶⁴ *Anness v. Freeman*, 294 S.W.2d 77, 78 (Ky. 1956).

⁶⁵ *Parrish v. Newbury*, 279 S.W.2d 229 (Ky. 1956).

⁶⁶ *Shuford v. Asheville Oil Co.*, 243 N.C. 636, 91 S.E.2d 903 (1956).

⁶⁷ *Storke v. Penn Mut. Life Ins. Co.*, 390 Ill. 619, 61 N.E.2d 552 (1945).

⁶⁸ *Shuford v. Asheville Oil Co.*, 243 N.C. 636, 91 S.E.2d 903 (1956).

⁶⁹ *Hess v. Country Club Park*, 213 Cal. 613, 2 P.2d 782 (1931); *Parrish v. Newbury*, 279 S.W.2d 229 (Ky. 1955).

construed in such liberal fashion as will find the requirement satisfied by mere succession to some interest of the covenanting parties. The touch and concern test probably cannot be done away with; however, it should be considered fulfilled if the covenant concerns either a pecuniary advantage to the land or a physical touching. The intent requirement, of course, must remain, and should be held satisfied if intent that the covenant run is shown from all the circumstances surrounding its signing. The covenant should be in writing, and this requirement should be necessary whether the covenant is considered to be an interest in land or not, for a written promise will allow the successor to know more definitely his rights and obligations.

Probably these tests will not be satisfactory to all. That is not important. What is important is that some conclusion is reached as to the tests to determine the validity of these covenants after thoughtful consideration of the problem in the light of present day needs. For, as Mr. Justice Holmes so aptly warned:

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.⁷⁰

George A. Patterson

⁷⁰ Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).